Office - Supreme Court, U.S.
FILED
FEB 15 1985
ALEXANDER L. STEVAS.
CLERK

No. 84-320

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NATIONAL FARMERS UNION INSURANCE COMPANIES; AND LODGE GRASS SCHOOL DISTRICT NO. 27,

Petitioners,

v.

CROW TRIBE OF INDIANS; LEROY SAGE, A MINOR; FLORA NOT AFRAID, HIS GUARDIAN; THE TRIBAL COURT OF THE CROW INDIAN RESERVATION; EDDIE ROUNDFACE, GLEN BIRDINGROUND, AND IRA LEFTHAND, JUDGES OF THE TRIBAL COURT OF THE CROW INDIAN RESERVATION; CROW INDIAN TRIBAL COUNCIL; AND DONALD STEWART, CHAIRMAN OF THE CROW INDIAN TRIBAL COUNCIL,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

---

BRIEF FOR RESPONDENTS LEROY SAGE AND FLORA NOT AFRAID

CLARENCE T. BELUE
Counsel for respondents Leroy Sage and Flora Not Afraid (Appointed by this Court)
215 West Third Street
Hardin, Montana 59034
(406) 665-1161

BEST AVAILABLE COPY

58 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether there is a federal claim for relief against Indian Tribal Governments that unlawfully assert civil jurisdiction over non-Indians.

2. Whether the Tribal Court of the Crow Indian reservation has jurisdiction over claims that involve the state of Montana (or its subdivisions), that arise on state owned land, and that occur in connection with activities that are compelled or encouraged by state and federal law or policy.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURSIDICTION	1
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	3
ARGUMENT	5
I. THE COURT OF APPEALS CORRECTLY FOUND THAT THE PETITIONERS COMPLAINT FAILS TO STATE A CLAIM FOR FEDERAL RELIEF	5
A. Congressional Intent	5
1. Indian Self-Government	6
2. District Court As An Appellate Court	10
3. Injunctions	11
4. Federal Indian Law	13
5. Exhaustion Of Tribal Remedies	13
B. Federal Common-Law	14
II. CONGRESS INTENDED THAT THE CROW TRIBAL COURT SHOULD HAVE JURISDICTION OVER TORT CLAIMS BY A TRIBAL MEMBER AGAINST A NON-MEMBER	14
A. Introduction	14
B. Pre-Treaty Crow Tort Jurisdiction	15
C. The Treaty Of 1825	15
D. The Treaty Of 1851	16
E. The Treaty Of 1868	17
F. The Non-Indian Comes Into The Reservation, "Cattle Barons"	20
G. The Organic Act Of 1864, Enabling Act And Constitutions Of The State Of Montana	23
H. The Organization Of Lodge Grass School District No. 27	26
I. The Indian Reorganization Act Of 1934	31
J. Modern Congressional Intent	32

Table of Contents Continued

	Page
III. THE EXECUTIVE BRANCH HAS ACTED CONSISTENT WITH THE INTENT OF CONGRESS	33
IV. THE JUDICIAL BRANCH HAS CORRECTLY INTERPRETED THE INTENT OF CONGRESS	35
A. Introduction	35
B. The Limitation To Tribal Entities	36
C. Interest Analysis	39
1. The Obligation To Provide A Forum	39
2. Protection Of Tribal Interests	40
3. Conformity To Tribal Standards Of Conduct	40
4. Right Of Reservation Indians To Govern Themselves	41
5. Availability Of A Forum	41
V. THERE IS NO STATE INTEREST REQUIRING A DENIAL OF CROW TORT JURISDICTION	42
A. Introduction	42
B. Sovereign Immunity	43
C. The Obligation To Operate A School	47
D. The Constitutional Considerations	48
VI. THE CROW TRIBAL COURT HAS ADJUDICATED WITH EQUITY AND JUSTICE	49
CONCLUSION	49

TABLE OF AUTHORITIES

CASES: Page

Atlantic Coast Line Railroad, Co. v. *Brotherhood Of Locomotive Engineers*, 398 U.S. 281, (1970) 10

Babbitt Ford v. *Navajo Indian Tribe*, 519 F. Supp. (1981) 41

Carl Laemmle Music Co. v. *Stern*, (DC-NY), 209 Fed. 129 Nlft 219 Fed. 534 (1913) 10

Cardin v. *De La Cruz*, 671 F. 2d. 363 (9th. Cir. 11982), U.S. Cert Den. 103 S.Ct. 293 41

Clark v. *United States*, 99 U.S. 382 (1979) 20

Crawford v. *Roy*, 176 Mont. 277 42

Ex Parte, McKardle, 7 Wall 506 8

Fisher v. *District Court*, 424 U.S. 472 (1924) 40, 42

Georgia v. *Chattanooga*, 264 U.S. 472 (1924) 44, 46

Kennerly v. *District Court*, 400 U.S. 423 (1971) 32-33, 40, 42

Lion Bonding & Surity Co. v. *Karatz*, 262 U.S. 77 (1923) 10

Marrion v. *Jicarrila Apache Tribe*, 455 U.S. 130 (1982) 11, 15, 19, 40

Martin v. *Hunters Lessee*, Wheat, 304 (1981) 8

McClanahan v. *State Tax Commission of Arizona*, 411 U.S. 164, (1973) 19, 36, 37, 44

Milwaukee v. *Illinois*, 451 U.S. 304, (1981) 14

Moe v. *Confederated Salish, Kootenai Tribes*, 425 U.S. 463 (1976) 28

Montana v. *United States*, 450 U.S. 544 (1981) .... *passim*

Moore v. *Pate*, 29 F.2d. 616 (1933) 10

Moran v. *Sturges*, 154 U.S. 256, (1923) 11

Morton v. *Mancari*, 417 U.S. 535, (1974) 35, 41

National Farmers Union v. *Crow Tribe of Indians*, 736 F2d. 1320 (1984) 13

Navada v. *Hall*, 440 U.S. 419 (1979) 43, 46

Oliphant v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978) 17-18

Parden v. *Terminal Ry. Co.*, 377 U.S. 184 (1964) .. 43, 46

Table of Authorities Continued

Page

Rooker v. *Fidelity Trust Co.*, 263 U.S. 413 (1922) 10

Santa Clara Pueblo v. *Martinez*, 436 U.S. 49, (1978) ..... *passim*

State Ex Rel. Flammand v. *Flammand*, ___ Mont. ___, 621 P2d., 471 (1980) 33, 42

Swift Transportation v. *John*, 546 F. Supp. 1185, (D. Ariz., 1982) 35-36, 37, 38

United States v. *Kagma*, 118 U.S. 375, (1886) 45, 48

United States v. *Mazurie*, 419 U.S. 544 (1975) 19, 35, 41, 46

United States v. *Wheeler*, 435 U.S. 313 (1978) 11

Washington v. *Confederated Tribes of the Colville Reservation*, 477 U.S. 134, (1980) ..... *passim*

Williams v. *Lee*, 358 U.S. 217 (1959) ..... *passim*

Worchester v. *Georgia*, 6 Pet. 515, 557 (1832) ... 11, 44, 46

STATUTES:

25 UNITED STATES CODE: Page

§ 450 32

§ 461 31

§ 1302 32

§§ 1321-1326 ..... 33, 42, 45

§ 1322 ..... 32, 42, 45

§ 1332 ..... 32, 42

§ 1451 32

§ 1901 ..... 32, 41

28 UNITED STATES CODE:

§ 1254(1) 1

§ 1331 ..... *passim*

§ 1345 8

§ 1362 8

§ 2283 11

Table of Authorities Continued

Page

MONTANA CODE ANNOTATED:

2-9-102 M.C.A. 47

Organic Act Of The Territory of Montana Of 1864, 13 Stat 85 ..... 5, 23, 24, 27, 45

Enabling Act Of The State Of Montana, 255 Stat 676 ..... 23, 25, 27, 45.

Act of April 11, 1882, 22 Stat 42 21

CONSTITUTIONS:

Constitution Of Montana, 1889, Ordinance No. 1 26

Constitution Of Montana, 1972, Article I 46

United States Constitution, Article I 26

United States Constitution, Article III 5, 8, 48

United States Constitution, Amendment 10 5

TREATIES:

Treaty with the Crow Tribe, 1825, 7 Stat 266 ..... 15, 18, 24, 27

Treaty of Fort Laramie with Crow & Etc., 1851, 11 Stat 749 ..... 16, 18, 27

Treaty with the Crows, 1868, 15 Stat. 667 .. 17, 19, 20, 27

Agreement with the Crows, 1880, (May 14, 1880)

Kappler, Laws and Treaties, Vol II, p. 1063 21

MISCELLANEOUS:

Bradley, *After The Buffalo Days*, (1972) 21-22

Big Horn County Historical Soc. *Lookin' Back*, (1976) ..... *passim*

Canby, *American Indian Law*, (1981) 39

F. Coen, *Handbook of Federal Indian Law*, (1882 Ed.) 34

Ratner, *Congressional Power Over The Appellate Jurisdiction Of The Supreme Court*, 109 Y.Pa. L.Rev. 157, 202 (1960) 8-9

Table of Authorities Continued

Page

17 Op. Atty. Gen. 134 (1881) 34

23 Op. Atty. Gen. 214 (1900) 34

55 Ind. Dec. 14, 50 (1934) 34

Op. Sol. Int., Oct. 13, 1976 34

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals is reported at 736 F.2d 1320 (1984) and is reproduced in the Appendix to the Petition at 1a. The opinion of the District of Montana is reported at 560 F. Supp. 213 (1983) and is also reproduced in the Appendix to the Petition.

JURISDICTION

The judgement of the Court of Appeals was entered on July 3, 1984. The Petition for Certiorari was timely filed with this Court on August 29, 1984. This Court granted certiorari as to both questions presented for review. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1) (1982).

28 U.S.C. § 1331 provides in relevant part for jurisdiction in the Federal Courts over civil causes of action that arise "under the Constitution, laws, or treaties of the United States."

STATEMENT OF THE CASE

As a preface to our statement of facts, we note that we dispute some of the facts set forth in the Petitioners' brief. We believe some of these errors are critical and will point them out and correct them as necessary to support our argument. We also preface by noting we will supplement the record with some facts of general history and public record of our area. We do so respectfully, noting that this court has taken judicial notice of such things in the past. See footnote 7 below.

May 27, 1982, Leroy Sage, a minor member of the Crow Tribe was injured in the parking lot next to the school of the Petitioner, (National) Lodge Grass School District

No. 27. The accident occurred on fee land owned by the district.[1]

The record is silent on how these injuries occurred[2] and as to what the incurred and future medical bills would total.[3] Sage and his guardian, Flora Not Afraid (Not Afraid), filed a negligence suit against the school district in Crow Tribal Court. Tribal process was served on the chairman of the school board, but the school district failed to answer Not Afraid's complaint or to appear in tribal court to contest it's jurisdiction. Not Afraid ultimately obtained a default judgement against the school district. Upon receiving notice of the default judgement, the

[1] National states there is a "mineral reservation therein held by the Crow Tribe." Pet. Brief at 3. This is not supported by the record, and in fact is false. The original patent from the United States has no reservation of minerals whatsoever. Patent No. 16072 dated January 5, 1911, recorded in the office of Clerk and Recorder of Rosebud County, Montana, on June 25, 1912, Bk. 9 p. 550.

It is also not in the record, nor is it true, that the land was given pursuant to the Crow Allotment Act of 1920 S16. See Pet. Brief at 4. A warranty deed shows the school purchased the land in 1918 for $750.00, *two years prior to the Allotment Act*. Instrument No. 12496, dated June 24, 1918, recorded in the office of the Clerk and Recorder of Big Horn County, Montana, December 23, 1918, Bk. 8 p. 250.

[2] The Petitioner asserts that Sage was struck by an *uninsured motorcyclist*. Again the record does not support this finding. See Pet. Brief at 4. We are not aware of the source for such statements. Excerpts of record filed with Ninth Circuit Nos. 5, 13, & 24 do not allude to these purported facts. We are not aware of the source for such statements.

[3] Here again Petitioner is mistaken. The record does not support the finding. Although the district court made such a finding no evidentiary hearing was ever held. The pleadings of Petitioner in the district court do not allege what these expenses were. There is no basis for the district court finding.

school district notified it's insurer, National Farmers Union (National), of the tribal suit. Neither the school district nor National contested the default judgement in Crow Tribal Court, (See Crow Tribal R. Civ. Proc. Rule 17(d), Joint Appendix at JA-17), or sought an appeal to the Crow Tribal Court of Appeals (See Crow Tribal Code § 31-1-103; Crow Tribal R. App. Proc., Joint Appendix at JA 33). Instead, National obtained a temporary restraining order from a federal district court prohibiting Not Afraid from enforcing her default judgement, and filed suit against the Crow Tribe, The Crow Tribal Council, The Crow Tribal Judges, and the Chairman of the Tribal Council, seeking a permanent injunction alleging federal jurisdiction under 28 U.S.C. § 1331 as a case involving a federal common law question.

The District Court, upon motions of Respondents to dismiss for lack of subject matter jurisdiction, found it had jurisdiction, and because it found the tribal court had no jurisdiction, it, without a hearing on the merits, issued a permanent injunction.

The Respondents appealed and the Ninth Circuit Court of Appeals reversed finding that National failed by their complaint to state a federal claim under 28 U.S.C. § 1331.

This Court granted National's petition for certiorari raising the questions of federal review of tribal court decisions, and the scope of tribal court jurisdication.

SUMMARY OF ARGUMENT

We believe this case presents two separate, but closely related questions. The first involves the existence of federal remedy. The second, more importantly, involves whether the Crow Tribal Court has the jurisdiction it asserts.

As to the existence of a federal remedy, we agree with the Court of Appeals. National simply failed to plead properly. This should not be confused with the label that has been attached to that decision that the tribal court became "the first and last arbiter of it's own jurisdiction." Pet. Brief at 6.

This pleading failure occurred because National misunderstands the intent of Congress, and specifically the scope of the District Court jurisdiction under 28 U.S.C. § 1331. The power to decide a federal "common-law question" is limited.

It is first limited by Congress' intent over Indian affairs. Congress intends to foster Indian self-government by forbidding the District Court to, in effect, become an appellate court over the Tribal Court. Furthermore, it did not intend that the District Court could use the injunction power to cripple and nullify the orderly functions of the tribal court system. Finally, it did not intend that federal court review of federal questions be available until tribal remedies are exhausted. The District Court violated all these principles of Congressional policy by it's construction of the meaning of § 1331.

These policies, coupled with the fact that recognition of a cause of action arising under federal common-law is an unusual course, to be approached cautiously, combine to make it clear that neither Congress, nor this Court approve a construction of § 1331, which would afford a federal remedy under the circumstances of this case.

As to the second question—the scope of tribal civil jurisdiction—we will scan the entire history of the Crow "Nation" and find that the Crows held and exercised jurisdiction over torts of non-Indians against Crows from the earliest times until the commencement of this case.

The treaties and acts of Congress clearly and consistently evidence this fact. Consistent with this fact, the non-Indians entered "Crow Territory" only with the permission of the Crows and on Crow terms. The Organic Act of 1864, creating the Montana Territory, The Enabling Act, and the two Constitutions of Montana evidence that non-Indian citizens of Montana recognized this limitation and agreed to be bound by it.

In addition to Congressional intent, it is evident that the Executive Branch and the Judicial Branch also recognize this tort jurisdiction of Indian tribes.

Also, there exists no state interest requiring a limitation upon Indian civil jurisdiction.

Finally, we will show that the Crow Tribal Court is a modern, capable court which has in this case exercised its jurisdiction wisely and justly. It will, in the future, dispense equality and justice to all who come before it, including National. It ought to be allowed to do so.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY FOUND THAT PETITIONERS' COMPLAINT FAILS TO STATE A CLAIM FOR FEDERAL RELIEF.

A. Congressional Intent

The District Court has only limited jurisdiction. Its power must come from the Constitution. U.S. Const. Amend. 10. Article III gave only the Congress the power to ordain and establish the District Court as an inferior court to this Court.

Congress exercised this power, giving the District Court original jurisdiction of certain civil actions arising under the Constitution, laws, or treaties of the United States. 28 U.S.C. § 1331. The Petitioners, by amended

complaint, alledged § 1331 jurisdiction in the District Court, claiming they raised a federal common-law question because the scope of tribal court civil jurisdiction is a question arising under the Constitution, laws, and treaties of the United States. The District Court found that the complaint stated a federal claim; the Court of Appeals did not. This Court granted certiorari to settle the question.

Respondent, Not Afraid, believes that Congress did not intend such a claim to be a § 1331 federal claim. The reasons for her belief are given in this section.

As stated above, only Congress can define the limits of the jurisdiction of the District Court. We will look at the statutes and cases to determine that intent. Our search reveals the following Congressional policies against holding that National's claim is a federal claim.

1. Indian Self-Government.

First, Congress has limited intrustion by federal courts upon tribal adjudications. *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, at 67-70, (1978). To emphasize the clarity, scope, and importance of this Congressional policy, a short review of some of this Court's findings in *Santa Clara Pueblo* seems in order, even at the risk of impropriety.

Although *Santa Clara Pueblo* involved the narrow question of whether a federal cause of action existed for enforcement of the rights created by the ICRA, this Court noted a *general* "Congressional purpose to protect tribal sovereignty from undue interference." *Ibid.*, at 63. Due note was made that Congress provided "for strengthening certain tribal courts." *Ibid.*, at 64. Tribal Courts were "recognized as appropriate forums for the exclusive adjudication of disputes affecting important

personal and property interests of both Indians and non-Indians." *Ibid.*, at 65. This Court even noted, while considering Congressional intent, that judgements of tribal courts, in some circumstances are entitled to full faith and credit in other courts. *Ibid.* fn 21. A review of legislative history revealed that various proposals for District Court review of tribal court decisions were rejected by Congress in favor of tribal court autonomy. *Ibid.*, at 66-72.

We share National's desire for federal court review of federal questions. But, the question before this Court is a limited one—whether National's complaint plead a federal remedy. It's failure to properly plead should not be viewed as a total denial of federal review of federal questions as is shown in the next paragraph.

We share the concern of Mr. Justice Rehnquist that the Court of Appeals decision be read so as to leave National with "no federal court remedy of any kind." ___ U.S. ___, 105 S. Ct. 7 (September 10, 1984). However, we respectfully believe that National had ample access to federal remedies without resort to § 1331 and an injunction against Not Afraid and the Crow Tribal Court. At least three opportunities are evident.

First, it must be remembered that National was the Plaintiff in the District Court. It was free to alledge any basis for jurisdiction and seek any remedy it deemed appropriate. It was not at the mercy of either Not Afraid or the Tribal Court. A similar dilemma faced the Fish and Game Department of Montana (a political subdivision like the Petitioner, Lodge Grass School District #27) when the Crow Tribe attempted to regulate fishing on the Big Horn river. Although the controversy eventually reached this Court, *Montana* v. *United States*, 450 U.S. 544 (1981), the parties, including the Fish and Game Department, the Crow Tribe and the United States, were able

to, in an orderly and respectful manner as to all those entities, litigate the case as a declaratory judgment action under 28 U.S.C. § 1345. National has not shown that the United States would have refused to bring such an action to resolve this case. The United States is still a fiduciary for the Crow Tribe, and as such, is just as interested in determining the scope of the power of the Crow Tribe to regulate fishing. The fact that it is appearing as Amicus seems to be proof of its desire to litigate this case. Apparently National, instead of seeking a remedy through assistance from the United States, decided too hastily to seek the harsh remedy of injunction under § 1331.

Second, the same reasoning is applicable to an action under 28 U.S.C. § 1362, authorizing suit by an Indian tribe if it arises under the constitution, laws, or treaties of the United States. Again, it does not appear that National attempted to persuade the Crow Tribe to participate in such a suit or that the Tribe would have refused to do so. This law suit is proof that the Tribe is willing to litigate the issue.

Thirdly, we believe this Court could entertain review by certiorari to the Crow Appellate Court, if National would have exhausted Tribal remedies. This is thus demonstrated. The Appellate power of this Court under Art. III of the Constitution extends to "all cases." *Martin* v. *Hunters Leesee*, Wheat. 304,338 (1816). "It is the case, then, and not the court, that gives the jurisdiction." *Ibid.* This appellate power is, furthermore, derived from the Constitution itself, not from Congress. ***Ex. parte***, *McKardle*, 7 Wall. 506, 512 (1869). Even in the absence of Congressional regulation, this Court could, under proper circumstances, exercise the appellate power, because Congress cannot negate the essential functions of this Court. Ratner, *Congressional Power Over the Appellate*

Jurisdiction of the Supreme Court, 109 Y. Pa. L.Rev. 157, 202 (1960). We believe considerations of Indian sovereignty, self-government, comity, appellate procedure, the need to avoid the harsh remedy of injunction, and the need to avoid clashes between competing courts, call for federal review under this Court's appellate power, if no other avenue is available. But, to justify federal review by the District Court under § 1331 because National has "no other federal remedy of any kind.", quite frankly, is a hasty conclusion, void of full consideration of the genuine interests of Not Afraid, and proper respect for the Crow Tribal Court. Tribal courts, at the very least, deserve more equality and respect as judicial tribunals. We do not believe tribal courts are the first and last arbiters of their own jurisdiction, but we do believe they are the first arbiters, and injunction by a district court is not the proper procedure to follow to provide access to the last arbiter -- this Court. We respectfully believe, § 1331 was, by its application against the respondents, wrongfully used to humiliate, embarrass, and shackle them, for over two years. As set forth elsewhere herein, we do not believe Congress intended § 1331 to be so construed and abused; we trust this Court will not allow such abuse, but will join the Court of Appeals on holding that National's complaint failed to state a claim for federal relief.

In summary, we simply argue that the general grant of federal jurisdiction under § 1331, read in the light of the more specific Congressional intent to foster tribal self-government, and to forbid federal court intrusion into tribal affairs, indicate that National's complaint to plead a federal claim.

2. The District Court As An Appellate Court.

Second, the District Court is not an appellate court. *Rooker* v. *Fidelity Trust Company*, 263 U.S. 413 (1922). It has no jurisdiction to directly review a state court judgement. *Atlantic Coast Line Railroad Co.* v. *Brotherhood of Locomotive Engineers*, 398 U.S. 281, 296 (1970). Such an action is a collateral attack upon the state judgement; the proper method for review is appeal within the state system; lower federal courts are not superior to state courts. *Lion Bonding & Surity Co.* v. *Karatz*, 262 U.S. 77 (1923). Even if the state court acts without jurisdiction, its ruling is not a proper subject for collateral attack by the District Court. *Carl Laemmle Music Co.* v. *Stern*, (DC-NY), 209 Fed. 129. Nlf'd 219 Fed. 534 (1913). The proper remedy is by appeal within the state court system. *Moore* v. *Pate*, 29 F.2d. 616 (1933).

We believe Congress intended that the District Court similarly refrain from acting as an appellate court over Tribal Courts, thus allowing the appellate process within the tribal court system to perform its mandated function. Our belief is based upon the following reasons.

As stated above, Congressional policy is to strengthen tribal self-government. Within the limited scope of tribal court jurisdiction over non-Indians, the judgments of these courts are entitled to full faith and credit in other courts. *Santa Clara Pueblo*, *supra*, at 65, fn 21. Congress has thereby evidenced its intent that the Tribal Court system be allowed to function through their various trial and appellate levels (as is the case with state systems) before federal questions arising therein are ripe for federal review.

If § 1331 is interpreted to afford National a federal remedy by its amended complaint, the District Court becomes, in effect, an appellate court to the tribal court.

There is no specific Congressional grant of such jurisdiction. We believe no other grant of appellate power has ever been given the District Court. We doubt Congress would impliedly, rather than expressly, grant such a radical enlargement of power. To imply such a grant of power would ignore the Congressional policy of fostering Indian self-government and that of preventing interference by federal courts with the orderly process of other court systems within the union.

3. Injunctions

Thirdly, the remedy afforded by the District Court injunction is itself a violation of Congressional policy.

28 U.S.C. § 2283 denies the power to the District Court to issue an injunction staying state court proceedings except as expressly authorized by Congress or where necessary to aid federal jurisdiction. We believe this statute is rooted in the need for mutual respect among coexisting sovereigns. Like State courts, tribal courts, regardless of how limited the scope of their powers, act with that same power of sovereignty. *Santa Clara Pueblo*, *supra*, p. 63, *Marrion* v. *Jicarrila Apache Tribe*, 455 U.S. 130 at 140 (1982), *Worchester* v. *Georgia*, 6 Pet. 515, 557. *United States* v. *Wheeler*, 435 U.S. 313 at 328 (1978). Therefore, they are entitled to the same protection from federal court intrusion as are the courts of the various states.

Comity alone calls for such a rule, but, this Court has gone further. In *Moran* v. *Sturges*, 154 U.S. 256, 14 S.Ct. 1019 at 1022 (1923), it said, "these rules have their foundation, not merely in comity, but on necessity; for if one may enjoin, the other may retort by injunction, and thus the parties be without remedy; being liable to a process for contempt in one if they dare to proceed in the other.

Neither can take property from the custody of the other by replevin or any other process, for this would produce a conflict extremely embarrassing to the administration of justice."[4] The injunction issued by the District Court "outlawed" the orderly functions of both the tribal levels and the appellate levels of the Crow Tribal Court system. It did more than afford National a federal remedy. It gave National the federally backed assurance that it need not appear in tribal court forums *ever, even to contest tribal jurisdiction*. As pointed out in footnote 4, the impropriety of the federal injunction is evident by considering the possibility that the Tribal Court could have also issued an injunction against National from proceeding in federal court. Then an impasse would have been reached. Until the jurisdiction question is finally resolved, injunction is not proper. We submit that Congress never intended such a construction of § 1331.

---

[4] This very embarrassing conflict has occurred in this case. As petitioner points out on page 6 of their brief, Judge Battin has ordered return of property executed upon by order of the Crow Tribal Court. The Tribal Court, after proper notice, hearing, and deliberation, ordered the property returned only if National posted a bond. The petitioners responded to that Tribal Court order by citing Respondents for Contempt of Judge Battin's Order for failing to unconditionally ask the Tribal Court to order the return of the property. These Contempt charges are pending as we write this brief. We, Not Afraid and her attorney, are "damned if we do and damned if we don't." We cannot be true to our convictions that the Tribal Court has jurisdiction over this matter and at the same time obey Judge Battin's order. We believe all parties have a duty, in the first instance, without interference from the District Court, to follow the orderly process of the Tribal Court system; as stated before, National has orderly remedies it could pursue. It refuses to do so.

4. Federal Indian Law

Practically the whole field of Indian law is Federal law. It is rooted in treaties. All of Title 25, U.S.C. is a compilation of Congressional law pertaining to Indians. In light of these facts we note that § 1331 gives district courts jurisdiction over all civil actions raising federal questions involving the requisite dollar amount. It generally defines district court jurisdiction. If National's interpretation of § 1331 is adopted, every action commencing in a tribal court raising the requisite federal question will be subject to federal injunction which, in effect, will remove the case to federal court. We submit that such an interpretation of a general definition of district court jurisdiction must yield to the specific intent of Congress to foster Indian self-government and to avoid federal court interference with tribal courts. If application of § 1331 is not so limited, Indian self-government will have very little, if any, meaning.

5. Exhaustion of Tribal Remedies.

Fifthly, and most importantly, it follows from the preceding arguments that Congress, no matter what it intended by enacting § 1331, no matter how restrictive it might view the scope of tribal civil power over non-Indians, and no matter how liberal it might be in its intent to grant federal review of tribal court assertions of power, it did intend that tribal courts be allowed to exist and function. This being the case, surely Congress also intended that National should exhaust its tribal remedies before seeking the harsh remedy of injunction. No one has suggested any policy or reason for the contrary. Both the court of appeals majority and dissenting opinion condemned National's disrespct for the Tribal Court. *National Farmers Union, supra*, at 1324, 1326. In spite of all this, and the passage of over two years, National still

refuses to exhaust its tribal remedies. We believe neither Congress, nor this Court, intended to sanction or allow such disrespect to merit District Court jurisdiction or relief.

B. Federal Common-Law.

The Court of Appeals also correctly grounded its ruling upon the principal that judicial recognition of a cause of action arising under federal common-law is an unusual course, to be approached cautiously. *Milwaukee* v. *Illinois*, 451 U.S. 304, 312-14 (1981). This observation was rightly coupled with the manifested Congressional intent set forth above to justify limiting § 1331 jurisdiction.

II. CONGRESS INTENDED THAT THE CROW TRIBAL COURT SHOULD HAVE JURISDICTION OVER TORT CLAIMS BY A TRIBAL MEMBER AGAINST A NON-MEMBER.

A. Introduction.

In this section we will trace the seat of Crow Tort Jurisdiction[5] from the times before the Crows first encountered the "white man" until the present. We will show that this power never left this people. They did not bargain it away by treaties; Congress, with its plenary power, did not unilaterally take it away. The State of Montana has no power to take it away. We will also speak about the power of exclusion at the same time because we believe that, like the power to tax non-Indians on the reservation, the Crow Tort Jurisdiction has, for its source

[5] We will give this term definite meaning. It means the subject matter jurisdiction or power to try a case involving a tort committed inside Crow Territory by a non-Indian against a Crow. It is the first power described below.

of power, not only sovereignty, but the power of exclusion. *Marrion* v. *Jicarrila Apache Tribe*, *supra*.

B. Pre-treaty Crow Tort Jurisdiction.

"The Crow Indians originated in Canada, but some three centuries ago they migrated to what is now Southern Montana." *Montana* v. *United States*, 450 U.S. 544, at 547 (1981). We submit it is an undisputed fact that prior to contact with non-Indians the Crows held both tort jurisdiction over non-Indians and the power to exclude non-members.

A simple reflection upon popular notions of conditions at that time proves that the Crows then held these powers. Any person who ventured into Crow Territory[6] and who "injured" a Crow in the least could expect swift "assumption of civil jurisdiction" over the "subject matter and parties" followed immediately thereafter by "judgment and recompense" by way of a scalping and usually death. Crude as it may seem, it evidences to the legal mind in unmistakable terms that prior to 1825 the Crow "Nation" held, and exercised, civil jurisdiction over torts of non-Indians committed against Crows within Crow Territory. The second power was also evident from the fact that the death penalty is the ultimate act of exclusion of a person from a territory.

C. The Treaty Of 1825.

This was the state of affairs when sixteen Crow Chiefs and Warriors "smoked the pipe of peace" with agents of

[6] This term means all ground within the limits of their claims to sovereignty. At most times, and in most contexts, it means land with the exterior boundaries of the Crow Indian Reservation. But, in early times, it was the land they were fighting to protect as their own.

the United States at the "Mandan Village," August 4, 1825. 7 Stat. 266. By this treaty, the Crows pledged friendship and asked for the *protection* of the United States from their enemies, one of which was becoming the non-Indians. The United States agreed to receive the Crows "into their friendship and unto their protection." *Ibid*, Art. 2.

One cannot read Articles 3, 4, and 5 of the treaty without recognization of the power retained by the Crows to exclude non-Indians from Crow Territory, the only exceptions being persons authorized by the United States and the Crows to pass through the territory and trade with the Crows. Thus, we conclude that the power of exclusion remained with the Indians under the treaty.

The only mention of torts of non-Indians against Crows is as follows:

> "And the United States hereby guaranty to any Indian or Indians of said tribe, a full indemnification for any horses or other property which may be stolen from them by any of their citizens: Provided, that the property stolen cannot be recovered, and that sufficient proof is produced that it was actually stolen by a citizen of the United States." *Ibid*, Art. 5.

It seems clear that this provision only promised compensation for torts of a non-Indian, a guarantee of compensation by the federal government. It says nothing about subject matter jurisdiction over a tort. Certainly no cessation of pre-1825 Crow Tort Jurisdiction could be implied from this treaty.

D. The Treaty Of 1851.

The parties next entered a treaty at Ft. Laramie on September 17, 1851. 11 Stat. 749. This treaty defined generally "the territory of the Crow Nation" spelling out

permission granted to the United States to "establish roads, military and other posts, within their [Nation]." *Ibid*. Art. 2. Thus, Crow sovereignty over territory was re-affirmed as well as recognition of the power to exclude all but those allowed by treaty with the United States.

Article 7 states that, "In consideration of the treaty stipulations, and for the damages which have or may occur by reason thereof to the Indian Nations, parties hereto . . . the United States binds themselves to deliver to said Indian Nations the sum of fifty thousand dollars per annum for the term of ten years . . ." This provision in a record of the Crows acting as a sovereign nation which settled a "tort claim" against the citizens of another sovereign nation *by use of treaty*. Obviously, then, the Crows, by this treaty, retained their pre-1825 Crow Tort Jurisdiction. As an asside, we noted that the treaty is evidence that, at that early day, the Crows were learning the "white man's ways." Instead of their barbaric earlier method of "settling" a tort dispute, they settled this one as one nation by treaty with representatives of the nation of the tortfeasor. We mention this in defense of ourselves speaking as Crows. We show we are capable of fairly, intelligently and justly adjudicating this present dispute. We deserve the power we assert.

E. The Treaty Of 1868.

The second treaty of Fort Laramie was executed May 7, 1868. 15 Stat. 649. We note, in agreement with Amicus Washington, that the treaty clearly forbids non-Indians from the reservation created as did the previous treaties. Amicus Washington, Supra. p. 9, (15 Stat. 649, Art. 2). We disagree with Amicus Washington as to the impact of Article 1 on Crow Tort Jurisdiction. In the first place, while criminal jurisdiction is clearly placed with the United States for punishment of non-Indian crimes, *(Oli-*

phant v. *Suquamish Indian Tribe*, 435 U.S. 191). The only statement as to civil jurisdiction is that the United States will "also re-imburse the injured person for the loss sustained." Amicus Washington suggests this clause should be coupled with the preceding clause about criminal punishment to exclude both criminal and civil jurisdiction over non-Indians committing wrongs against Indians. To so conclude ignores some important considerations.

First, it must be remembered that both the tenor and specific provisions of the treaties of 1825 and 1851, preceding this one, placed the United States in the place of "guaranty" and "indemnification" for non-Indian wrongs, but no cede of Crow Tort Jurisdiction was made. The well known principles favoring construction of these treaties in a light most favorable to the Indians dictates that the provisions "to re-imburse the injured person for the loss sustained" be construed consistent with the continuation of the warranty commitment rather than a relinquishment of previously existing Crow Tort Jurisdiction. This is especially true if the meaning of the article appears on its face to be unclear, and we submit that at its best, its meaning is unclear.

Second, the suggested interpretation makes its construction of Article 1 in complete disregard of *Williams* v. *Lee*, 358 U.S. 217 (1959). It contends Article 1 answers the question of Crow Tort Jurisdiction when non-Indians come into the reservation by denying the power. But *Williams* was a case where the non-Indian did come in, and the court did uphold Indian tort jurisdiction, and, *Williams* considered the 1868 treaty with the Navajos (15 Stat. 667) a treaty identical to the Crow Treaty for these purposes.

Thirdly, Amicus Washington's construction of Art. 1 also flies in the face of many other decisions of this Court finding that at least some civil jurisdiction over non-Indians existed historically and to this present day. *Merrion* v. *Jicarrila Apache Tribe*, 455 U.S. 130 (1982), *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49 (1978). *United States* v. *Mazurie*, 419 U.S. 544 (1975). Yet this Amicus argues Art. 1 denies *all* such civil jurisdiction. This cannot be.

Fourthly, the "warranty" construction we place upon Article 1 is also consistent with the general role of guardian the federal government has assumed on behalf of the Indian generally and the Crows specifically. See *McClanahan* v. *State Tax Commission of Arizona*, 411 U.S. 164, 175, interpreting the similar 1868 Navajos treaty to "establish the lands within the exclusive sovereignty of the Navajos under general federal supervision." The government committed by these early treaties to act as a "protector" of these persons, handicapped by their language, education, and traditions from dealing with the "civilized western man." This is not to say that such assumption of guardianship was a relinquishment of civil power from the Crows to the federal government. It merely provided trustee assistance in the discharge of this power while the Crows were disadvantaged. As we shall see, the guardian relationship of the federal government has lessened over the years as the Crows have "matured" in their ability to exercise their power in the "white man's world," but they have never relinquished this civil jurisdiction. As will be shown hereafter, Congress has consistently protected it and lately fostered its full exercise by the Crows. We again emphasize that Art. 2 of this treaty reaffirms that the seat of power of Crow Tort Jurisdiction continued to reside with the Crows. Further evidence of this fact, and especially of intent to

eventually allow full exercise of it by the "ward," is the fact that Art. 7 establishes schools for the Indians. This is the beginning of attempts to remove the impediment that existed to self-government in a white man's world—ignorance.

F. The Non-Indian Comes Into The Reservation, "Cattle Barons."

This is where we feel compelled to expand the historical account pertinent to this case. We will consider from the published works, and public records,[7] the events which disclose how the non-Indians got onto the reservation in spite of the above referenced three treaties forbidding their presence without the consent of the Crows. We deem this appropriate as it will shed light upon the question of whether non-Indians entry and remainder was ever coupled with immunity from Crow Tort Jurisdiction. With this explanation of need, we proceed to examine their entry.

Non-Indians were forbidden from the reservation in very specific terms by the Treaty of 1868. As we have also established that only the Crows and the federal government could give permission for entry, other entries were trespasses.

We note that Art. 4, Treaty of 1868, carved out the first exception to the rule that the reservation was to be "set apart for the absolute and undisturbed use and occupation of the Indian." Namely, that the Indian agents would, "make said reservation their permanent home . . ."

Later, not only Indian agents but also traders, missionaries, and cattle ranchers came to stay. We will focus

[7] This Court may take judicial notice of "a part of the public history of the Country." *Clark* v. *United States*, 99 U.S. 493 (1879).

upon their coming to see if Congress, through treaty or law, immunized them from the retained Crow Tort Jurisdiction.

We will not specifically treat the agents, traders, and missionaries, but merely note in passing that they came to the reservation under express permission of the federal government and the Crow "Nation." None of their appointments, licenses, or grants of permission exempted them from Crow Tort Jurisdiction. We will specifically treat the advent of cattle ranchers in Crow Territory.

The bulk of the non-Indians coming to the reservation have, until the advent of recent coal development, been persons tied to cattle grazing "empires." As early as 1880 the way was paved for the grazing of the herds from Texas going to Montana to be grazed on the reservation. A treaty of May 14, 1880, never ratified, would with the consent of the Crows "permit cattle to be driven across the reservation or grazed on the same, the parties desiring to so drive or graze cattle." Kappler, *Laws and Treaties*, Vol. II p. 1063. This same provision was reaffirmed by the Act of April 11, 1882, 22 Stat. 42, which was ratified.

Apparently cattle had been trespassing onto the reservation around 1880, but leasing developed under the direction of the Indian department a little later. The practice expanded as time went on. Bradley, *After The Buffalo Days*, an account of the first years of reservation life for Crow Indians, based on official government documents from 1880 to 1904, Lodge Grass Mt: by Author, 1972, p. 108-119, 167-174; *Lookin' Back*, a history of Big Horn County, Big Horn County Historical Society, 1976, p. 315-316. "Cattle Barons" of Big Horn County, included the Antler Ranch, and the Spear Cattle Company.

Lookin' Back, *supra*. p. 235, 236. The granddaughter of Matt Tschergi, founder of the Antler Ranch, boasted of his exploits of Indian land as follows:

> "At one time, his grazing cost was so low that he could take on a partner's steers for 50 cents per head per month; provide all the range at 25 cents per head, the labor and paperwork; guarantee the return of the principal with 5 percent interest; throw in 2 percent loss clause and still have a good deal for himself, even if the steers just held the money together." *Lookin' Back*, *supra*, p. 257.

These non-Indian ranchers were making this money from Indian lands. They came to the reservation by lease agreement authorized by the leasing Acts of 1880 and 1882 above referenced. No cede of any jurisdiction or sovereignty was made by these Acts. These people came to the reservation with permission and grant for one purpose—to raise cattle. The Indians were facing starvation and poverty at the time, being forced to sell about 1/3 of their reservation to survive. See Act of April 11, 1882, *supra*, *After the Buffalo Days*, *supra*, p. 33.[8] But, they did not give up their claims to sovereignty over the lands that remained. The Congressional Acts confirm this fact by their silence.

---

[8] We hesitate to speak further for fear that we will be interpreted as exaggerating the truth. But we must say, at the same time, Cattle Empires were being built while the Indians found it almost impossible to become "farmers" as the "Great White Father" asked. Instead, they faced starvation. *After the Buffalo Days*, Supra, p. 67. Can we ever say these people intended to relinquish their sovereignty? The correct statement seems to be that they might have been sorely tempted to do so by unbearable conditions, but they never voluntarily intended to do so. Their treaties and the Acts of Congress should not be so construed.

Congress did not change the leasing policy until May 25, 1926, 44 Stat. 568. Again, the act is silent as to civil jurisdiction over the non-Indian lessees. We again assume that Congress and the Crows intended no cessation of Crow Tort Jurisdiction.

G. The Organic Act Of 1864, Enabling Act, And Constitutions Of The State Of Montana.

In further support of the proposition that the Indians relinquished no tort jurisdiction to these non-Indians inhabiting the reservation, and that, non-Indians came into the reservation charged with knowledge that they were subjecting themselves to the Crows in a governmental or jurisdictional sense, we now review the Organic Act, Enabling Act, and two State Constitutions forming the foundations for the government the non-Indians, the State of Montana.

On May 26, 1864, 13 Stat. 85, *four years before the Crow Treaty of 1868*, Congress created the territorial government of Montana for the non-Indians of that territory as follows:

> "Be it enacted . . . That all that part of the territory of the United States included within the limits to-wit: [description of territory omitted] . . . be, and the same is hereby created into a temporary government by the name of the territory of Montana . . . Provided further, that nothing in this act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said territory so long as such rights *remain unextinguished* by treaty between the United States and such Indians, or to include any territory, which by treaty with any Indian tribes, is not, without the consent of said tribe, to be included within the territorial limits or jurisdiction of any state or territory; but all such territory shall be excepted out of the boundaries, and con-

> stitute no part of the territory of Montana, until said tribe shall signify their assent to the President of the United States to be included within said territory, or to affect the authority of the government of the United States to make any regulations respecting such Indians, their lands, property, or other rights by treaty, law, or otherwise, which it would have been competent for the government to make if this act had never passed." (emphasis supplied)

We repeat for emphasis, this act preceded the 1868 Treaty of Laramie. When the non-Indians obtained their territorial government in 1864, pre-treaty Crow Tort Jurisdiction retained by the Treaty of 1825 and the 1851 Treaty, "remain unextinguished," as the Organic Act so clearly recognizes. To make this even more clear, the Organic Act states that Indian Territory, absent tribal consent, is not to be within "the territorial limits or jurisdiction of any state or territory, but all such territory shall be excepted out of the boundaries, and constitute no part of the territory of Montana, until said tribe shall signify assent to the President of the United States . . ."

And what was the governing Indian treaties as of 1864 with the Crows? A simple, straightforward promise in 1825 to exclude non-Indians and to protect the Indians and to "guaranty" and give "full indemnification" for the losses suffered at the hands of the United States citizens. Crow Treaty, 1825, *supra*, Art. 1-5. And, the 1851 Treaty merely continued that warranty that the "United States bind themselves to protect the aforesaid Indian Nation against commission of all depredations by the people of the said United States, after the ratification of this treaty." Treaty of 1851, *supra*, Art. 3. Again, as stated above, in 1851 the Crows were remedying tort claims as full sovereigns by treaty.

Crow Tort Jurisdiction could not possibly have been diminished by the Organic Act of 1864. The territory of

Montana, and its non-Indian citizens obtained their own territorial government on the express condition that Crow Tort Jurisdiction *remain unextinguished*, and that the Indian lands were not to be even a part of the Montana territory or jurisdiction at all. This could not be more clear.

What, then of the Enabling Act, Statehood, and the Montana Constitutions? The Enabling Act was approved February 22, 1889, 25 Stat. 676. It conditions statehood as follows:

> "That the people inhabiting said proposed states do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all the lands lying within the limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, and the same shall be and remain subject to the disposition of the United States, and said Indian lands shall *remain* under the absolute jurisdiction and control of Congress of the United States . . ." (emphasis supplied)

We emphasize the word "remain." What is its antecedent? It is, and must be, the clear and complete disclaimer of the Organic Act of 1864 to both territory and jurisdiction of Indians, and thence back to the Treaties of 1851, 1825, and pre-treaty retained Crow Tort Jurisdiction. All of this is consistent with the fact that the non-Indians were at this time absolutely excluded from even being in Crow Country without specific permission. They could have no rights there, especially immunity from Crow Tort Jurisdiction. They entered entirely on whatever terms the Crows demanded. And, there is no evidence that the Crows ever relinquished their Tort Jurisdiction on any of the occasions that permission to enter the reservation was granted.

The Montana Constitution of 1889 shows that the non-Indians accepted these terms and restrictions demanded by the federal government. See Constitution of Montana, 1889, Ord. No. 1, wherein language identical to the Enabling Act is set forth including the word "remain." See, also, the Montana Constitution of 1972, Art. 1, compact with the United States, which also reaffirms the same conditions, including, again, the use of the word "remain."

H. The Organization of Lodge Grass School District No. 27.

With this background, we are ready to examine the organization of the Petitioner, Lodge Grass School District No. 27, a political subdivision of the State of Montana, to determine if Congress intended that it be subject to the Crow Tort Jurisdiction or, whether it should be afforded some type of immunity.

Lodge Grass School was organized by order of the County Superintendent of Schools of Rosebud County, Montana, February 28, 1911. See document No. 184, Order of the Superintendent of Schools, Rosebud County, on file in the office of the County Superintendent of Schools of Rosebud County, Montana, at Forsyth, Montana. The first trustees were a local rancher, minister, and merchant.[9] No Indian was allowed in this school from

[9] They were: A. M. Stevenson, General Store Owner, and licensed Indian Trader, who came to Lodge Grass in 1902. *Lookin' Back*, *supra*, p. 10-11; W. A. Petzoldt, a minister and missionary who, with the consent of the federal government and the Crows, December 1, 1903, established a mission and Indian School at Lodge Grass. The Indians were not allowed in the Lodge Grass School until 1920 with the passage of the Allotment Act of that year, *Lookin' Back*, *Supra*. p. 183, 184; the third trustee O. P. McKinley, was a cattle rancher, *Lookin' Back*, *supra*, p. 243.

1911 to 1920, when the Allotment Act of that year was passed by Congress. *Lookin' Back*, *supra.*, p. 183, 184. Crow Allotment Act of 1920, 41 Stat. 751.

The Lodge Grass School now sits on 5 acres of land deeded to the trustees of said school and purchased by them for $750.00 on June 24, 1918. See Instrument No. 12496, recorded in the Office of The Clerk and Recorder of Big Horn County, Montana, December 23, 1918. This land was part of a patent issued January 11, 1911. See footnote 1 above. Neither of these instruments make any mention of Indians, or Indian powers whatsoever. No cede of Crow Tort Jurisdiction can be claimed from the grants.

We now have the establishment of the Lodge Grass School in its historical setting to determine if Congress, at the time of the inception of the school, afforded it any immunity from Crow Tort Jurisdiction. We find none as will be shown.

First, as shown above, Crow Tort Jurisdiction, remained with the Crows from pre-treaty times, through the treaties of 1825, 1851 and 1868. It especially *remained* in spite of the Organic Act of 1864, the Enabling Act of 1889, and the Montana Constitution of 1889, all of which ceded power to the non-Indians of Montana, but which also specifically excluded from that grant of power any power over the Crows of their territory, and furthermore, failed to give any immunity from Crow Tort Jurisdiction for any non-Indian going into Crow Territory.

Second, we address the effect of the 1887 Allotment Act and answer Amicus Washington's claim that the Lodge Grass School property as fee patented land lost its status as Indian Land.

Amicus Washington contends that alienation of this land to non-Indians somehow defeated the Crow Tort Jurisdiction. *Amicus Washington, supra.* p. 10-11, citing as authority, *Montana, supra.*, at 559.

This language of *Montana* that "It defies common sense to suppose the Congress would intend that non-Indians purchasing allotted lands would become subjected to tribal jurisdiction," must be understood in its context. This was a footnote to what we perceive was the principle holding of *Montana,* that tribal sovereignty is not diminished by allowing the State to regulate activity like fishing, when that regulation does not infringe upon the exercise of tribal sovereignty. The complete meaning of the footnote, as pertinent here, seems to be then, that non-Indian fee owners are not automatically and totally subjected to tribal jurisdiction just because they own land inside the reservation and especially when they have done nothing which affects the tribe or its members. But, this does not speak to the case here where, obviously, the conduct of the school was found by the Crow Tribal Court to have caused injuries to a Crow Indian.

We see no other way to read this footnote, if we are at the same time to give meaning to the court's later acknowledgement that Crow Tort Jurisdiction does still exist on the reservation over non-Indians on fee lands. *Montana, supra.* at 565, 566.

Furthermore, this "checkerboard jurisdiction" claim made by Amicus Washington, was clearly rejected by this Court. See *Moe* v. *Confederated Salish Kootenai Tribes,* 425 U.S. 463, at 478 (1976) where Mr. Justice Rehnquist, speaking for the Court said, "If the General Allotment Act, itself, establishes Montana's jurisdiction as to those Indians living on "fee patented" lands, then for all jurisdiction purposes—civil and criminal—the Flathead Reservation has been substantially diminished in size . . .

we conclude that "[s]uch an impractical pattern of 'checkerboard jurisdiction' *Ibid.* was contrary to the intent embodied in the existing federal statuary law of Indian Jurisdiction." *Ibid,* p. 478.

Finally, we answer the statements of Lodge Grass School in its brief at page 20. As is now evident, the school pre-dated the Allotment Act of 1920 by 9 years. We have great difficulty with the school's statement that, "it exists because Congress, in the Crow Allotment Act of 1920, § 16, *supra, required* the State of Montana to own land on the reservation provided it was used for public education and *mandated,* that Montana thereby provide Indian children equal educational opportunities on the Crow Reservation." (emphasis supplied) Pet. Brief at 20. We find no other way to treat this statement with due respect, but to say that it simply is not true either in the whole or in its parts. How can the school exist for 9 years prior to 1920, serve only non-Indians, and then exist *because* Congress required it to serve Indian children? Furthermore, a simple reading of the cited § 16 of the Act shows that Montana was not "*required*" to afford Indian children equal education. The grant was *conditionally* made, the condition being that, *if* the State would provide equal education for Indian children, it would receive the school sections of land. Had Montana chosen not to assume this obligation it could have done so, and thereby, it would not have received the lands.

Petitioner's defense that the school is not a profiteer,[10] while technically correct, also misrepresents the truth.

---

[10] We disagree with Petitioner that the Lodge Grass School, at its inception, did not represent 'profiteers.' The minority report of the House Indians Affairs Committee in 1880 reviewing a proposed allotment bill said:

> "The real aim of this bill is to get at the lands and open them up for settlement. The provisions for the apparent benefit of the

After all, what is the State of Montana and its political subdivision, Lodge Grass School District No. 27? In 1911, when the school was organized, it was an educational subdivision, organized principally for children of the ran-

---

Indian are but the pretext to get at his lands and occupy them . . . If this were done in the name of greed, it would be bad enough; but to do it in the name of humanity, and under the cloak of an adurent desire to promote the Indian welfare by making him like ourselves whether he will or not, is infinitely worse . . ." Getches, *Cases and Materials on Federal Indian Law*, p. 71 (1979).

Robert Yellowtail, first Indian to be a superintendent of an Indian Reservation, 1933-1945, who still lives and is over 90 years of age speaks of the General Allotment Act and the "Cattle Barons" as follows:

"At about this time the Texas cattle herd drives were in full swing to the Montana ranges. Nelson Story, who was a local cattle raiser, initiated grazing the Crow Reservation ranges and employing Crow Indian cowboys as employees and breaking horses for his cattle horse-working herds. Other cattlemen with herds from the Texas drives, such as the 04, UT, FUF and other cattle outfits, were all busy getting grazing leases for 3 cents per acre on the lush ranges of the Crow Reservation. Today, these same ranges are bringing $2.00 and more per acre. The Crow grazing ranges have yielded many rich cattle owners and yet the Crow people are languishing in economic want and misery because they hadn't the money with which to graze their own cattle on their ranges and become rich as have the white cattle raisers who have been using their grass to enrich themselves. That process is still going on. All of the Indians' economic woes were created by this deceptive and conniving bill sponsored by the Government to get the Indians' lands.

"The General Allotment Act of 1887, known as the Dawes Act, was an Act of Congress to speed up the sale of Indian land to the whites. The Indians under this Act, were allotted 160 acres to the heads of families and 80 acres to others then, thereafter, the lands left after the allotments were declared surplus and sold to the whites. In this manner vast areas of Indian lands were transferred to the whites and soon thereafter the Indians became a landless horde seeking Government aid to survive. Thus began the Indian problem of today which the Government itself created. All of the Indians' economic woes were created by this wicked, deceptive and conniving Bill sponsored by the Government to get the Indians' lands." *Lookin' Back, supra.*, p. 316.

chers making a living, and even fortunes, from Indian lands. *Lookin' Back, supra*, p. 257. As already pointed out, this school was the school of these ranchers and their attending merchants. They organized under the state laws, but they were guests and "profiteers" on the reservation with the permission of the Crows. They were richly blessed from the Crow lands, true by the sweat of their own brows, but as a jurisdictional matter, they came looking for their fortune on Indian terms, not State of Montana terms.

Most importantly, where is the indication of Congress in 1911, when the school was organized, that Congress, with its plenary power over the Indians, intended the school to be immune from the Crow Tort Jurisdiction? We have reviewed the treaties and laws and find none.

I. The Indian Reorganization Act of 1934.

To Amicus Washington's claim that the Indian Reorganization Act of 1934, (48 Stat. 984, 25 U.S.C. § 461 *et. seq.*), continued a prior policy of denying civil jurisdiction to Indian tribes, we make statements proving the contrary.

First, as has been shown above, the continuing policy of Congress was not one of denial, but of recognition of Crow Tort Jurisdiction. The aborted policy of assimilation never achieved its ultimate objective. It was abandoned before the final step was reached—termination of the reservation and the attendant Crow Tort Jurisdiction.

Second, while one reading of the hearings and debates quoted by Amicus might indicate no intent to grant extensive Tribal Court power, this does not mean that the sovereign Crow Tort Jurisdiction did not lodge with the Crows. It *remained*. At worst, it was being held

temporarily in trust for the Crows by the federal government—its guardian.

Third, the Crow Tribe has never brought itself within the strictures of the Indian Reorganization Act. Like the Navajos, they never incorporated under that Act. Their powers remained as recognized by the proceeding laws and treaties set forth above.

From the foregoing, we see no loss of the Crow Tort Jurisdiction by the passage of the Indian Reorganization Act. We see only an end to the potentially destructive effect of the different allotment acts that potentially could have, but did not, destroy this power.

J. Modern Congressional Intent.

Any examination of history to find Congressional intent as to Crow Tort Jurisdiction should not end with the Indian Reorganization Act. Much has been said since.

We will forego elaborate treatment of this subject, and only say that there is a number of significant acts which evidence Congressional intent to encourage, implement and strengthen Indian Self-Government. See the Indian Financing Act of 1974, 25 U.S.C. § 1451, *et. seq.*; the Indian Child Welfare Act of 1978, 25 U.S.C. § 1901 *et. seq.*; the Indian Self-Determination Act of 1975, 25 U.S.C. § 450, *et. seq.*

Most significant in this area is the Indian Civil Rights Act of 1968, 25 U.S.C. § 1302 *et. seq.* § 1322 allows a state like Montana to exercise jurisdiction over a civil case (like torts) "between Indians or to which Indians are parties which arise in the areas of Indian Country . . ." only with the consent of the tribe. The Crow Tribe has given no consent. There can be no such state tort jurisdiction by Montana. *Kennerly* v. *District Court*, 400 U.S. 423

(1971). See also *State ex rel Flammand* v. *Flammand*, ____ Mont ____, 621 P.2d 471 (1980) where the Montana Supreme Court refused to exercise civil jurisdiction, noting non-compliance with 25 U.S.C. 1321-1326, of a civil action by a non-Indian against an Indian arising on an Indian Reservation. In spite of this obvious barrier, National insists that we take our claim to state court. *Pet. Brief, supra.* p. 22. It gives no authority for its belief. We believe that to do so would not only violate the ICRA specifically, but it would infringe upon inherent Indian tribal jurisdiction and the recognized Congressional policy of fostering Indian self-government as evidenced by the ICRA and other modern legislation.

In summary, we believe the Crow Tribe retains Crow Tort Jurisdiction. Our review of history reveals that Congress, with it's plenary power to diminish this power, has not done so. It has even acted positively in discharge of its guardianship duty to the Crows to foster and encourage exercise of this power.

III. THE EXECUTIVE BRANCH HAS ACTED CONSISTENT WITH THE INTENT OF CONGRESS.

We now consider the acts of the Executive Branch of the United States to determine if its acts have been consistent with our view of Congressional intent.

Before doing that, we again point out a matter of some confusion. Since the treaty of 1825, the President and his branch of this government have acted as "protectors" or guardians of the Crows. The treaties and laws recognize duties owned by the United States to the Crows, but they do not cede Crow Tort Jurisdiction powers to the federal government or the States.

The Executive Branch has consistently recognized the power of Indian Tribes to subject non-tribal members to

tribal civil jurisdiction. See F. Cohen, *Handbook of Federal Indian Law*, 253 (1982 Ed.). See, also, 23 *Op. Atty Gen.* 214 (1900) and 17 *Op. Atty Gen* 134 (1881). Two opinions rendered by the Solicitor of the Department of the Interior support tribal civil jurisdiction over non-Indians. In a comprehensive opinion rendered in 1914, the Solicitor concluded:

> ". . . over all the lands of the reservation, whether owned by the tribe, by members thereof, or by outsiders, the tribe has the sovereign power of determining the conditions upon which persons shall be permitted to enter its domain, to reside therein, and to do business." 55 Ind. Dec. 14, 50 (1934)

The power referred to by the solicitor applies regardless of the status of the land involved which is the status of the liability producing act.

> ". . . even if the Indian title to particular lots sold had been extinguished . . . the result is still the same, for the legal right to purchase land within an Indian reservation gives to the purchaser no right of exemption from the laws of such nation." 23 *Op. Atty Gen* 214, 217 (1900). See also *Buster* v. *Wright*, 135 F 947 (8th Cir. 1905).

Each of the above cited authorities was cited with approval by the Supreme Court in *Washington* v. *Confederated Tribes of the Colville Reservation*, 447 U.S. 134, 98 S.Ct. 2069, 281 65 L.Ed.2d. 10 (1980). Therefore, the validity of the principles expressed still remains.

The most recent example of the Executive Branch acting upon the assumption that tribes possess civil authority over non-Indians occurred in 1976. The Solicitor of the Department of Interior affirmed tribal civil authority over non-Indians in both the regulatory and adjudicatory areas in an opinion received October 13, 1976. See *Op. Sol. Int.*, Oct. 13, 1976.

The final point to be made is that in addition to acting on a belief that tribes have such jurisdiction, the Executive Branch has a recognized general interest of encouraging tribal sovereignty and independence. See *Morton* v. *Mancari*, 417 U.S. 535, 555. 94 S.Ct. 2474, 2485, 41 L.Ed.2d. 290 (1974).

IV. THE JUDICIAL BRANCH HAS CORRECTLY INTERPRETED THE INTENT OF CONGRESS.

A. Introduction.

The judicial branch of the federal government has upheld tribal jurisdiction over non-members in a variety of instances. Justice Marshall, writing for the Supreme Court in *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, (1978) stated:

> "Tribal Courts have repeated been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians." *Martinez*, 435 U.S. at 65.

The basis of such decisions lies in the recognition of the fact that Indian tribes are "unique aggregations possessing attributes of sovereignty over both their members and their territories . . ." See *United States* v. *Mazurie*, 419 U.S. 544, 557, (1975). As recently as 1981 the Supreme Court upheld tribal jurisdiction in this area.

> "A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the Tribe." [Citations omitted] See *Montana* v. *United States*, 450 U.S. 544, (1981).

The District Court relied upon the interpretation of the above quoted portion of *Montana* found in *Swift Trans-*

portation, Inc. v. *John*, 546 F. Supp. 1185, (D.Ariz., 1982) to conclude that the facts of the instant case do not support the assertion of tribal jurisdiction. Not Afraid asserts that *Montana*, upon analysis of the applicable statutes and case law, and specifically against the backdrop of tribal sovereignty. [See *McClanahan* v. *State Tax Commission of Arizona*, 411 U.S. 164, 172, (1973)] does not require that conclusion.

B. The Limitation To Tribal Entities.

The District Court memorandum opinion relies heavily upon that portion of *Swift* which limits the tribe's jurisdiction over non-Indian conduct to activities which threaten the tribe as a collective entity. See *District Court Memorandum Opinion*, Pet. App. at 22a-24a. *Swift* involved the tortious conduct of a non-Indian on land within a reservation. The *Swift* court, upon consideration of that portion of *Montana* which upholds tribal jurisdiction over conduct which "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare *of the tribe*," (emphasis added), reached the following conclusion:

> "The court of course understands that an automobile accident can have a 'direct effect on . . . the economic security, or the health or welfare of the individual involved.' Under this second portion of the test, however, the focus is on the interests of the tribe rather than the interests of the individual members of the tribe." *Swift*, 546 F. Supp. at 1193.

This conclusion is clearly erroneous upon consideration of *McClanahan, supra*. *McClanahan* involved the attempt by the State of Arizona to impose its personal income tax on a reservation Indian whose income was derived solely from reservation sources. The Arizona

Court of Appeals, in upholding the challenged application of the tax, held that the issue:

> ". . . is not whether the Arizona state income tax infringes on plaintiff's rights as an individual Navajo Indian, but whether such a tax infringes on the rights of the Navajo tribe to be self-governing." *McClanahan* v. *State Tax Commission*, 14 Ariz. App 452, 454, 434, P2d. 221, 223. (1970)

Similarity of the emphasis of the tribal entity rather than the individual tribal member in *McClanahan* as in *Swift* is clear. In striking down the tax, the Supreme Court in *McClanahan* rejected the emphasis on tribal as opposed to individual rights.

> "Finally, we cannot accept the notion that it is irrelevant 'whether the . . . state income tax infringes on [appellant's] rights as an individual Indian, as the State Court of Appeals maintained. [citations omitted] To be sure, when Congress has legislated on Indian matters, it has, most often, dealt with the tribes as collective entities. But those entities are, after all, composed of individual Indians, and the legislation confers individual rights. This Court has therefore held that 'the question has always been whether the state action infringed on the right of *reservation Indians* to make their own laws and be ruled by them.' *Williams* v. *Lee*, *supra*, at 220 of 358 of U.S., at 271 of 79 S.Ct. (emphasis added) In this case, appellant's rights as a reservation Indian were violated when the state collected a tax from her which it had no jurisdiction to impose." *McClanahan*, 411 U.S. at 181.

The interpretation of *Montana* found in *Swift* cannot stand in light of *McClanahan*, a case which has never been overruled.

That portion of *Montana* which contains the phrase ". . . threatens or has some direct effect on the political integrity, the economic security, or the health or welfare

of the tribe." *Montana*, 101 S.Ct. at 1258, (emphasis added), cannot be given the interpretation used in *Swift* for the reason that it is followed by a citation to *Williams* v. *Lee*, 358 U.S. 217, (1959). *Williams* stands for the proposition that a tribal court has exclusive jurisdiction to hear the contractual claim of a non-Indian plaintiff against an Indian Defendant. The Court based its decision on the sovereign right of reservation Indians to make their own laws and to be governed by those laws. The instant case is distinguishable in that it involves an Indian plaintiff and a non-Indian defendant. The irrelevance of a distinction based on a reversal of roles has been recognized by the Honorable Judge William C. Canby, Jr., writing in *American Indian Law*, Judge Canby stated:

> "Strong policies also support the view that tribes may exercise jurisdiction in the *William* v. *Lee*, situation if it is reversed—that is, if the Indian originally sues the non-Indian. The subject matter of the transgression that occurred in Indian Country is exactly the same, and concerns tribal self-government just as much, when the Indian sues the non-Indian as when the reverse occurs . . . moreover, the Supreme Court has recently acknowledged that the tribe has inherent civil authority, even on non-Indian reservation lands, over actions of non-Indians that affect Indian interests such as 'the political integrity, the economic security, or the health or welfare of the tribe' *Montana* v. *United States*, 450 U.S. 544 (1981).
>
> "The tribal interest is clear when an Indian sues a non-Indian for a claim arising in Indian country; as already discussed, this is simply *Williams* v. *Lee* except that the Indian rather than the non-Indian chooses to bring the suit." Canby, *American Indian Law*, pp. 142-145 (1981).

Judge Canby's position was apparently approved by this Court in *Williams* itself when it said:

> "It is immaterial that respondent is not an Indian, He was on the Reservation and the transaction with an Indian took place there." 358 U.S. at 223.

C. Interest Analysis

Assuming, for the purposes of argument, that *Swift's* conclusion that non-consensual non-Indian conduct must affect a tribal interest for tribal jurisdiction to arise, it does not follow that no sufficient tribal interests exists in the instant case. The Crow Tribe has several interests involved when a member is injured by the tortious conduct of a non-Indian.

1. The Obligation To Provide A Forum.

The most basic interest concerns the obligation of the tribe, as a responsible governmental entity, to provide a forum for the peaceful resolution of disputes involving members of the reservation community. This type of interest prompted Congress to enact the so-called "Public Law 280."

Providing a forum for the peaceful resolution of disputes fulfills three tribal interests. It provides an alternative to self-help vindication of rights. The public vindication of private rights through public institutions tends to deter future violations. Most importantly, the resolution of disputes through public court room tends to foster public confidence in government. The alternative is self-help and the resulting anarchy that vigilante-ism brings.

Chief Judge Muecke recognized these interests when he wrote:

> ". . . it is also apparent that unlawful repossession threatens or has some effect on the political in-

tegrity, the economic security, or the health or welfare of the tribe. [citations omitted] The tribe has a real interest in discouraging self-help repossessions. Not only does [the tribal repossession statute] reduce the possibility that Indians will be wrongfully deprived of their property, it was enacted for the express purpose of preventing 'breach of the peace'." *Babbitt Ford*, 519 F. Supp. at 431.

2. Protection Of Tribal Interests.

The Tribe clearly has an interest in ensuring that injured tribal members obtain compensation from a tortfeasor. The alternative is for the tribe to provide social services to the victim during the pendancy of his recovery. The effect of denying tribal members a right to obtain a tribal remedy would have two effects. "Not only would it undermine the authority of tribal forums . . . but it would also impose serious financial burdens on already 'financially disadvantaged' tribes." *Martinez*, *supra*, 436 U.S. at 64.

Fisher v. *District Court*, 424 U.S. 382, 386 (1976), citing *Kennerly* v. *District Court*, 400 U.S. 423, 426-429 (1971) expressed great reluctance to subject "a dispute arising on the reservation among reservation Indians to a forum other than the one they have established for themselves." The present controversy does involve Indians; it does involve conduct of a non-Indian on the reservation. These facts call for the tribal forum to adjudicate this controversy.

3. Conformity To Tribal Standards Of Conduct.

The power of an Indian tribe to regulate the conduct of non-Indians and enforce tribal standards of behavior as an adjunct of the tribe's responsibility for the health and welfare of its members has been recognized. See *Marrion* v. *Jicarillo Apache Tribe*, 455 U.S. 130, (1982), *Washington* v. *Confederated Tribes of the Colville Reservation* 447 U.S. 134 (1980), *Cardin* v. *De La Cruz*, 671 F.2d. 363 (9th Cir. 1982), U.S. Cert. denied 103 S.Ct. 293, *United States* v. *Mazurie*, 419 U.S. 544 (1975).

4. Right Of Reservation Indians To Govern Themselves.

The most important interest of all concerns the right of reservation Indians to "make their own laws and to be ruled by them." *Williams* v. *Lee*, 358 U.S. at 200, 79 S.Ct. at 271:

> "The whole basis of our notions of personal jurisdiction if grounded on the principle that the forum where the wrong was committed—where the injury was suffered, is the appropriate place to sue." *Babbitt Ford, supra*, 519 F. Supp. at 428.

The above assertion is especially applicable in the instant case due to the general federal interest in furthering Indian Self-Government. See *Morton* v. *Mancari*, 417 U.S. 535, 555, (1974), and also due to a specific tribal interest in the tribe's young people:

> "Recognizing the special relationship between the United States and Indian Tribes and their members and the federal responsibility to Indian people, and Congress finds . . . that there is no resource that is more vital to the continued existence and integrity of Indian Tribes than their children . . ." See *Indian Child Welfare Act*, Codified at 25 U.S.C. 1901 (3).

Clearly, the tribe has an important interest in providing a forum to an Indian child.

5. Availability Of A Forum.

One final point must be made. The right to litigate problems arising on a reservation in a tribe's own forum, guaranteed in *Williams* v. *Lee*, Must be upheld for the reason that no other forum exists with jurisdiction over

the instant case. Federal jurisdiction does not exist for two reasons. First, no diversity of citizenship exists as Not Afraid and the Lodge Grass School District No. 27 are citizens of the same state. Second, a tort committed against an Indian is not a federal question.

The State of Montana has not complied with the federal statutory procedure by which it could obtain jurisdiction of civil causes of action arising with the Crow Reservation. See 25 U.S.C. § 1322. Therefore, no State jurisdiction exists. *Kennerly* v. *District Court*, 400 U.S. 423, (1971). *State Ex Rel Flammond* v. *Flammond*, ___ Mont. ___, 621 P.2d. 471 (1980). The Montana Supreme Court, noting the state's non-compliance with 25 U.S.C. 1321-1326, refused to exercise civil jurisdiction of a cause of action involving an Indian and non-Indian which arose on the Blackfeet Reservation. The sole exception arises when the event complained of involves significant or substantial events off the reservation. *Flammond, supra*, at 472. See also *Fisher* v. *District Court*, 424 U.S. 382, (1976), and *Crawford* v. *Roy*, 176 Mont. 227.

Since no off-reservation events occurred in the instant case, the State of Montana would not exercise jurisdiction. Clearly, the failure to uphold the tribe's jurisdiction in the instant case would create a situation inimical to the Congressional interest in insuring law and order on the Indian Reservations.

VI. THERE IS NO STATE INTEREST REQUIRING A DENIAL OF CROW TORT JURISDICTION.

A. Introduction.

We now search for some interest of the State of Montana which could possibly justify a denial of Crow Tort Jurisdiction over this case.

B. Sovereign Immunity.

Although we title this section "Sovereign Immunity," we are not sure of what we talk about because National has only hinted at the exact nature of its claim for "immunity." At any rate, we offer the following.

The case of *Parden* v. *Terminal Ry. Co.* 377 U.S. 184, (1964) involved a FELA action of citizens of Alabama against a railroad owned and operated in Interstate Commerce by the State of Alabama. On Certiorari from the Fifth Circuit, the Supreme Court, Mr. Justice Brennan held that a State that owns and operates a railroad in Interstate Commerce may not plead sovereign immunity as a defense to the suit. His opinion states:

> "By empowering Congress to regulate commerce, then, States necessarily surrendered any portion of their sovereignty that would stand in the way of such regulation." 377 U.S. at 192.

Nevada v. *Hall*, 440 U.S. 419, (1979) also limits sovereign immunity. Here the plaintiff's were involved in an automobile accident in California, with a vehicle driven by an employee of the State of Nevada. Plaintiff sued the State of Nevada for damages in the California courts. California law granted the unlimited right of recovery for damages. Nevada retained limited sovereign immunity from such a suit, and raised its immunity as a defense in the California Courts. On Certiorari, the Supreme Court, Mr. Justice Stevens held that Nevada could not claim such immunity when it was sued for its torts committed in California. Justice Stevens ruled:

> "In this Nation each sovereign governs only with the consent of the governed. The people of Nevada have consented to a system in which their State is subject only to limited liability in tort. But the people of California, who have had no voice in Nevada's decision, have adopted a different system. Each of these

decisions is equally entitled to our respect." 440 U.S. at 426.

A similar rationale resulted in the decision of *Georgia* v. *Chattanooga*, 264 U.S. 472, holding that land acquired by one state in another state is held subject to the laws of the latter and to all the incidents of private ownership. The proprietary right of the owning state does not restrict or modify the power of eminent domain of the state wherein the land is situated.

These holdings are analogous to this case. To understand the analogy, it is necessary to review the doctrine of Indian Sovereignty.

Chief Justice Marshall stated in *Worchester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832):

> "The Cherokee Nation . . . is a distinct community . . . in which the laws of Georgia can have no force . . . but with the assent of the Cherokees themselves, or in conformity with treaties, and with the Acts of Congress."

Of course, this doctrine has been subjected over the years to a great deal of interpretation, and even modification in light of various treaties and acts of Congress. See outline of this history set forth in *McClanahan* v. *State Tax Commission*, 14 Ariz. App. 542, 454, 434, P.2d. 221, 223 (1970).

"But it is nonetheless still true, as it was in the last century, that [t]he relation of the Indian tribes living within the borders of the United States [is] an anomalous one of a complex character . . . they were and always have been regarded as having a semi-independent position when they preserved their tribal relations; not as states, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations,

and thus far, not brought under the laws of the Union, or of the state within whose limits they reside." *United States* v. *Kagama*, 118 U.S. 375, 381-382.

Williams v. *Lee*, *supra*, upheld this retained sovereignty in a context similar to this case. Justice Black, upholding the inherent jurisdiction of the Navajo Tribal Court over the collection of a debt owned by Indians to a non-Indian merchant for a debt contracted on the reservation, stated:

> "There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the Tribal Courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves. It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there. Cf. *Donnelly* v. *United States*, *supra; United States*, *supra*. The cases in Court have consistently guarded the authority of Indian government over their reservations." *Id.* at 223

It is significant that Montana, like Arizona is, by Act of Congress, namely, the ICRA, Public Law 280, and by express declaimers in its Organic Act, Enabling Act, and its Constitutions, restrained from exercising "jurisdiction over civil causes of action between Indians or to which Indians are parties which occur in the Indian Country situated with such states." 25 U.S.C. § 1322. Finally, it must be remembered that tribal sovereignty is subordinate only to the Federal Government not the states. *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 154 (1978).

This brief review reveals that Indian sovereignty, whatever its limits, is not subject to state interference, unless Congress specifically calls for such. No such intent has been shown as to civil jurisdiction. There is then, no rational basis for a rule governing sovereign immunity to

Montana. This case is no different from those rules cited above. Like the *Parden* holding, *supra*, Montana surrendered its immunity to the plenary power of Congress over Indians. U.S. Const. Art. I Sec. 8. Like the *Hall* holding, *supra*, the laws of the Crow Tribe are entitled to just as much respect as those of Montana. When the State of Montana decided in 1911 to establish a school in Indian Country, it, at the same time, submitted itself to the laws of Indian Country and waived its immunity from suit in the Crow Tribal Court.

Like the *Georgia* case, *supra*, the school lands of the State of Montana within Indian Country are subject to the power of the Crow Nation wherein they are situated.

Some other analogies also show no need to afford immunity.

Indian tribes have the power to tax the activities of non-Indians taking jurisdiction on indian lands in cases where the tribe has a significant interest in the subject matter. *Washington* v. *Confederated Tribes of Colville*, *supra*. The power to tax is the power to adjust rights of ownership in property. The power of a court which awards judgments for damages arising from torts also adjusts rights of ownership of property. Thus, the power of Tribal Courts to adjudicate tort claims against non-Indians arising from their conduct on a reservation is consistent with the recognized power to tax non-Indians, and is no more of an intrusion upon the interests of the State of Montana then those that have already been sanctioned by this Court.

Likewise, the power to regulate non-Indians is recognized as an attribute of sovereignty and policy of Congress. *U.S.* v. *Mazurie*, 419 U.S. 544, 557 (1975). The power to regulate is no more extensive than the power to

adjudicate a civil dispute arising from a tort. To recognize the former calls for recognition of the latter.

In summary, we see no precedent or reason for giving Montana or non-Indians immunity from Crow Tort Jurisdiction.

C. The Obligation To Operate A School.

Exercise of Crow Tort Jurisdiction does not hamper Respondents' operation of their school. Sovereign Immunity is waived as to the claim itself. 2-9-102 M.C.A. This is conceded. Pet. Brief, *supra*, at p. 21. They, thus, concede they must defend Not Afraid's claim. They only object to the forum. How does this interfere with the operation of a school? They have not shown that it does. We submit it does not.

Execution on the judgment which Petitioner claims "paralyzed" discharge of its duties to provide education, is not related to the question of jurisdiction now before this Court. Pet. Brief, p. 22. If the Tribal Court has jurisdiction over this controversy, it certainly has power to enforce its judgment. When the Court of Appeals mandate became effective, it in effect upheld the Tribal Court judgment. If National desired to avoid execution, it should have obtained a stay prior to the issuance of the Writ of Execution. It had an effective means of avoiding seizure of its property; it refused to avail itself of its remedies. As to the claim that State law prescribes the method of satisfying a judgment against a school district, we reply that it should be obvious that if the tribe has jurisdiction over this matter, it also has the power to enforce its judgment by its own laws, and is not fettered by state laws.

The tribal court did not attempt to regulate or interfere with the operation of the school in any way. It merely

attempted to adjudicate a tort claim. We simply cannot see how state education process are impeded by Crow Tort Jurisdiction.

D. Constitutional Considerations.

Amicus Salt River, Amicus brief, Salt River Project, Agriculture Improvement and Power District and Arizona Public Services Company, suggests that Art. III, U.S. Constitution, forbids Crow Tort Jurisdiction. Br. Amicus, Salt River, p. 9. This is novel. They appear to reason that because Art. III mandates appellate review and the Court of Appeals denied review, therefore, non-Indians should not be subject to Crow Tort Jurisdiction. We do not follow this argument, because first, there is ample opportunity for federal review as set forth above. Second, as also pointed out above, Indian Jurisdiction does not derive from the Constitution, but from the Indians themselves, and their treaties with the United States. Thirdly, the proposal for District Court review does not resolve the problems we discussed above inherent in making the District Court an appellat court to the tribal court.

As stated in *United States* v. *Kagama*, 118 U.S. 375 (1886), the Indians "owe no allegiance to the states, and receive from them no protection. Because of the local ill-feeling, the people of the states where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing from the federal government with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power." 118 U.S. at 384. A bibliography of the Indian cases coming before this court would, for the most part, substantiate a longstanding conflict between state and tribal authorities. Indeed, the States consist mostly of non-Indians. It is to receive protection from the powers of the state that Indians live

on reservations. If anything, the presence of the state authorities, subdivisions or institutions inside the reservation *calls for greater affirmation of Indian sovereignty*, instead of state immunity as claimed.

VI. THE CROW TRIBAL COURT HAS ADJUDICATED WITH EQUITY AND JUSTICE

The Crow Tribal Court has a modern code. See Joint Appendix A and B. It is equipped to handle this case through the appeal level. *Ibid*, Appendix C. It has shown it is fair and is prepared to afford every proper remedy and right due National, if it would appear before that court. The jurisdiction in the Tribal Court will be wisely exercised and will not only afford self-government to Not Afraid, but justice to the Lodge Grass School.

CONCLUSION

For the reasons given above, the judgment of the Court of Appeals should be affirmed and the jurisdiction of the Crow Tribal Court over the torts of non-Indians upheld.

Respectfully submitted,

CLARENCE T. BELUE
Counsel for respondents
Leroy Sage and
Flora Not Afraid
(appointed by this Court)

215 West 3rd St.
Hardin, Montana 59034